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Rethinking the China-Israel BIT in Light of the Fragmented International Investment Legal Order: A Commentary

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The practice of International Investment Agreements (IIAs) has developed immensely during the past 15 years. In particular, China has gained significant experience in concluding IIAs, adapting to concerns raised following an overflow of investor state disputes. This article analyzes an interesting case-study: an investment promotion agreement signed and negotiatied between China and Israel (CIBIT) during the 1990s, however ratified more than a decade later, in 2009, without modifying or updating its contents. This commentary identifies major gaps in the CIBIT, including those concerning its preamble, key definitions of 'Investment' and 'Investor', standard of protection: FET, MFN, NT, and ISDS provisions, vis-à-vis the wider transformation of international investment law. Special emphasis is given to China's change in approach to investment and IIAs. The growing economic ties between China and Israel, including recent discussions about a free trade agreement, requires a thorough understanding of the risks and benefits of the CIBIT. Therefore, the commentary concludes with an outline of a strategic roadmap for the future revision of the CIBIT.

Keywords: International Investment Agreements, China and Israel FDI Policies, MFN, NT, Investor State Dispute Resolution (ISDS), FET, ICSID.

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I. Introduction

A. The Fragmented Practice of International Investment Agreements and the CIBIT

International investment law is fundamentaly fragmented. So far, attempts to conclude an international investment agreement with an all-encompassing scope of application have been futile.[1] It is similar to the World Trade Organization ("WTO")'s single undertaking. This fragmentation is exacerbated by fundamental criticism concerning the effectiveness of international investment agreements ("IIA"). In recent years, there has been a reinvigoration of the academic discourse on the causal link between IIAs and the promotion of foreign direct investment ("FDI"). The themes explored the impact of IIAs on FDI, generally showing mixed results. FDI had flown to countries that did not conclude IIAs, Brazil being one such example.[2] In the case of China, Professor An Chen concluded:

> Frankly, the main reason for the huge inflow of FDI into China over the past two decades-odd is not the conclusion of Sino-foreign BITs giving complete jurisdiction to ICSID, but the cheap labor, the preferential policies to foreign investment, the vast domestic markets, and comparatively rich and low-price resources in China.[3]

IIAs signal states' willingness to receive investments, but simultaneously impose asymmetric obligations on those states.[4] Increasing investor-state litigation during the past decade,[5] with landmark cases challenging governmental acts such as the Plain Packaging Cigarettes Policy, attracted increasing criticism.[6] There are also controversies concerning the legitimacy of such claims in wake of government intervention in times of financial crises.[7] Arbitrators are required to draw the line between legitimate governmental acts under the state power doctrine, and between illegitimate acts that call for international intervention.[8]

Recent trends of IIA negotiations are all trying to address these concerns with tailor-made solutions, without attempting to resolve the basic element of fragmentism. The China-Canada BIT,[9] China-Australia FTA,[10] and the TPP[11] all address such concerns with different solutions. Going back to the 1980s and the 1990s, influenced by the Washington Consensus on benefits of privatization and rule of law, IIA programs were increasing.[12] Many of these IIAs were drafted